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IN THE

Supreme Court of the United States

October Term, 1955

No. 94

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

—against—

STORER BROADCASTING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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February 6, 1956.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

Opinion Below

The opinion of the court of appeals (R. 46-52) is reported at 220 F.2d 204. The Report and Order of the Federal Communications Commission adopting the rule in issue (R. 16-27) and that rule (R. 29) appear at 18 FED. REG. 7796-7800.

Jurisdiction

The judgment of the court of appeals was entered February 24, 1955 (R. 52). The petition for writ of certiorari was filed May 23, 1955, and was granted October 10, 1955 (R. 53). Petitioners invoke the jurisdiction of this Court under 5 U. S. C. § 1040 and 28 U. S. C § 1254(1).

Question Presented

Whether the statutory power of the Federal Communications Commission to make rules and regulations "not inconsistent with law" authorized the Commission to proscribe ownership of interests in more than five television stations by § 3.636 of the Commission's Rules and Regulations, which

(a) as construed by the Commission, denies an applicant for a lawful use of an available frequency the hearing on the issue of public interest required by Section 309(b) of the Communications Act of 1934;

(b) converts the statutory standard of public interest into a conclusive numerical presumption; and

(c) was promulgated by an order that failed to disclose an adequate basis for relating the specific numerical limitation to the public interest.

Statutes and Regulation Involved

The pertinent substantive sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151-609, are as follows:

Section 309

"(a) If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

"(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify

the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying particularly the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant." [47 U.S.C. § 309]

Section 311

"The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly con-

trolled by such person) whose license has been revoked by a court under section 313." [47 U.S.C. § 311]

Section 313

"All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however*, That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court." [47 U.S.C. § 313]

The pertinent rule making sections of the Communications Act are as follows:

Section 4

* * *

"(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." [47 U.S.C. § 154 (i).]

Section 303

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall——

* * *

"(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: * * *

* * *

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, * * *." [47 U.S.C. § 303.]

The pertinent portion of Regulation § 3.636 provides:

"*Multiple Ownership.* (a) No license for a television broadcast station shall be granted to any party (including all parties under common control†) if:

"†The word 'control' as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

* * *

"(2) Such party, or any stockholder, officer or director of such party, directly or indirectly owns,

operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenien or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.† [47 C.F.R. § 3.636 (1953)]

"†In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 per cent or more of the outstanding voting stock."

Statement

The proceeding below was instituted January 22, 1954, by respondent Storer Broadcasting Company (Storer) to set aside a Report and Order (Order) of the Federal Communications Commission.* The Order, dated November 25, 1953 (R. 16-27), promulgated the revisions that are

*Under Section 402(a) of the Communications Act of 1934, 47 U. S. C. § 402(a); Section 4 of the Judiciary Review Act of 1950, 5 U.S.C. § 1034; and Section 10 of the Administrative Procedure Act of 1946, 5 U.S.C. § 1009 (R. 33-38).

§§ 3.35, 3.240 and 3.636 of the Rules and Regulations of the Commission (47 C. F. R. §§ 3.35, 3.240, 3.636 (1953); R. 27-29). Those revised rules relate to the multiple ownership by licensees of interests in radio and television broadcast stations.

The revised rules provide generally that no license will be granted if the grant "would result in a concentration of control of . . . [broadcast stations] . . . in a manner inconsistent with public interest, convenience, or necessity." That standard is converted into a conclusive numerical presumption by the further provision of the rules that: "The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or director to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than" seven standard (AM) [§ 3.35], seven frequency modulation (FM) [§ 3.240] or five television (TV) [§ 3.636] broadcast stations (R. 27-29), regardless of the location, power or any other factor affecting the size of the audiences reached by the stations.*

At the time the rules were adopted, Storer (or wholly-owned subsidiaries) held licenses to operate 7 AM stations, 5 FM stations and 5 TV stations, the latter all being VHF stations (R. 35). Storer then also had on file with the Commission a pending application for a sixth TV station in the VHF band (R. 35-36, 39). Simultaneously, with

*Effective October 22, 1954, to encourage use of the ultra high frequency (UHF) band, § 3.636 was amended to permit ownership of interests in a total of seven television stations, only five of which, however, might be in the very high frequency (VHF) band. 19 FED. REG. 6102.

promulgation of its numerical proscription rules the Commission dismissed the pending Storer application, without a hearing (R. 39-44), on the ground that the application violated "the spirit and purposes of Section 3.636 . . . of our Rules" (R. 42). Storer thereupon filed its petition for judicial review of the numerical proscription rules (R. 33-38).

The judgment of the court below sets aside so much of § 3.636 as conclusively presumes that there would be a concentration of control contrary to the "public interest, convenience, and necessity" for any person to have an interest in more than 5 TV broadcasting stations (R. 52-53).

The decision of the court of appeals has two bases. It rests, first, upon those terms of Section 309(b) of the Communications Act (*supra*, pp. 2-3) that give applicants a right to a hearing on the issue of public interest. The court below held that except to the extent that the Congress itself had defined the public interest affecting an individual application for a license, the statutory right to a hearing was unqualified; and that

> " . . . any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected." (R. 50)

As a second basis for its decision, the court of appeals observed that the Commission may not freeze

> " . . . into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances may differ widely from case to case." (R. 50)

Summary of Argument

I

The numerical proscription rules of the Commission are invalid since, as interpreted by the Commission, they deny the statutory right of a license applicant to that hearing guaranteed by Section 309(b) of the Communications Act. Denial by an administrative agency of a statutorily ordered hearing is a denial of due process under the Fifth Amendment of the Constitution.

Section 309(b) of the Communications Act declares that if the Commission is unable to find that public interest, convenience and necessity would be served by the granting of an application, it shall forthwith notify the applicant of the grounds and reasons for its inability to make such finding and give the applicant an opportunity to reply. If the Commission, after considering such reply is still unable to make that finding,

> "... it shall formally designate the application for hearing upon the grounds or reasons then obtaining. ..."

The numerical proscription rules deny such hearing. The Commission by these rules has ordered, in effect, that one evidentiary fact—the number of licenses held by the applicant—shall be conclusive evidence, irrespective of all other facts and circumstances, of the ultimate fact of "public interest" which the Act requires the Commission to determine.

Storer concedes that Section 309(b) does not require the Commission to hold a hearing before denying a license to operate a station in ways contrary to those that the

Congress has determined are in the public interest. When, however, the question of who shall receive a license for a lawful use of an available facility is reached, the Congress has not conferred upon the Commission any authority to establish rigid classifications of applicants so as to deprive them of that right of hearing granted by the Congress.

II

The order of the Commission states that the rules were promulgated

> ". . . to implement the Congressional policy against monopoly enunciated specifically in Sections 311 and 313 of the Communications Act." (R. 19)

Apparently recognizing that the rules cannot be sustained on that basis, petitioners now argue that the rules may nevertheless be sustained as an implementation of a commission policy—stated to be a policy different from the congressional policy against monopoly—to promote diversification of ownership to insure a maximum diversification of program and service viewpoints.

An administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained. Although the Commission may not justify its action on a ground different from that upon which such action was taken, the fact is that the rules cannot be sustained on either of the grounds advanced by petitioners.

The numerical proscription rules cannot be sustained as an implementation of congressional antimonopoly policy. Viewed as a purported implementation of those laws, the

numerical proscription rules constitute a determination that the acquisition by any one person of an interest in more than the specified number of broadcast stations has an economic effect contrary to the policies of the antitrust laws, without regard to the facts concerning the actual or potential effect of such acquisition upon competition. That determination is squarely in conflict with the express provisions of the anti-trust laws requiring analysis of economic consequences.

Moreover, the numerical proscription rules cannot be sustained as an implementation of the Commission's purported program-diversification policy. Although diversification of program and service viewpoints is one of a number of proper objectives of the Commission, the rules here under attack bear no relation to that end. The rules preclude consideration of the program and service viewpoints actually available in any service area; they apply to ownership of stations serving wholly different areas; they exclude an otherwise qualified applicant for a given broadcast facility in an area which is not served by any existing facility, even where there is no other qualified applicant, and, finally, they exclude a multiple owner from areas in which there are more unlicensed facilities than qualified applicants and to which area such owner would bring an additional viewpoint. Those results clearly are not in the public interest.

To the extent that the numerical proscription rules are intended, as petitioners suggest, to close the door to individual hearings "in a realm where particular evils are not readily susceptible of proof" (Pet. for Cert., p. 12) adoption of the rules debases performance of the Commission's administrative function.

III

The Administrative Procedure Act requires that the Commission "shall incorporate in any rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 1003(b).

In its Order the Commission made no attempt to show that the specific numbers bore any rational relationship to "concentration of control" of broadcasting "contrary to the public interest, convenience, or necessity." No showing whatsoever was made of any way in which the specific ceiling numbers would operate to serve the public interest.

The failure of the Commission to relate its choice of numbers to the avowed purpose of the rules results from the fact that the Commission has no facts or experience upon which to base its numerical formulae and that the number of licenses, per se, bears no relationship to concentration of control.

ARGUMENT

POINT I

THE NUMERICAL PROSCRIPTION RULES ARE INVALID BECAUSE THEY PURPORT TO AUTHORIZE DENIAL BY THE COMMISSION OF A LICENSE APPLICATION WITHOUT A HEARING AND A DETERMINATION OF PUBLIC INTEREST, CONVENIENCE AND NECESSITY.

The court of appeals concluded that selection of a maximum figure beyond which multiple ownership of TV broadcast stations will not be permitted, regardless of what an applicant might be able to show with respect to the public interest, is contrary to the mandatory hearing provisions

of Section 309(b) of the Communications Act and would in effect repeal or nullify that important section (R. 51).

Section 309(b) declares that if the Commission shall be unable to find that the public interest, convenience or necessity would be served by the granting of an application, it shall forthwith notify the applicant of the grounds and reasons for its inability to make such finding and give the applicant an opportunity to reply. If the Commission, after considering such reply is still unable to make that finding

> ". . . it shall formally designate the application for hearing on the grounds or reasons then obtaining. . . ."

That hearing requirement of Section 309(b) reflects a technique, conceived as necessary by Congress, to assure that administrative control will continually be abreast the dynamic aspects of radio transmission. As this Court has noted, the whole Communications Act, including both its rule-making and licensing procedures is pregnant with

> ". . . recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138.

Thus, since the Act of 1927, application in licensing proceedings of the standard of public interest has been governed by comparative considerations, on a case-by-case basis.* That technique, carried into the Communications

National Broadcasting Co. v. United States, 319 U. S. 190, 217; FEDERAL RADIO COMM'N ANN. REP., 169-170 (1928).

Act of 1934, gains expression, among other places, in Section 309(b) which

> "... gives applicants a right to a hearing before their applications are denied." *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327, 330.

The decision below is entirely consistent with the carefully reticulated licensing and rule making scheme that Congress wrote into the Communications Act. That decision does not construe Section 309(b) either (1) to bar promulgation by the Commission of substantive rules applicable to license proceedings or (2) to require that its powers in this respect be limited to the matters specifically itemized in Section 303. It simply accords with those decisions of this Court that say that under Section 309(b) the Commission must grant a hearing to an applicant to determine the "public interest, convenience, and necessity" before denying a license for a lawful use of an available frequency [*Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327; *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470], and holds that the Commission may not by substantive rule essay to preclude that hearing.

We recognize, of course, that Section 309(b) does not require the Commission to hold a hearing on the issue of public interest before denying a license under a rule of the Commission if the Congress has itself so defined the public interest as to preclude the grant. *Felman* v. *United States*, 339 U.S. 973 (rules prohibiting licensing an applicant who proposes to transfer by contract to a third person part of the licensee's responsibility for the operation of the station in violation of Section 301 of the Communications Act); *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (rule prohibiting licensing an applicant who proposes

to broadcast lotteries in violation of Section 1304 of the United States Criminal Code [18 U.S.C. § 1304]); *Logansport Broadcasting Corp.* v. *United States*, 210 F.2d 24 (D.C. Cir.) (rule prohibiting licensing an applicant who proposes to disrupt "equitable distribution of radio service" among the several states and communities in violation of Section 307(b) of the Communications Act).* Other provisions of the Communications Act similarly obviate any requirement that the Commission hold a hearing on the issue of public interest before denying a license to an applicant who is an alien (Section 310) or whose prior license has been revoked by a court for antitrust law violation (Section 311).

In all such cases, the Congress has barred the possibility of a commission finding, prerequisite to the grant of a license, that the license would serve the public interest.**

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*The rule treated in the *Logansport* case related to that "fair, efficient and equitable distribution of radio service" which Section 307(b) requires the Commission to accord the several states and communities. Administration of the requirements of Section 307(b) necessarily works a limitation upon the power of the Commission to apply the standard of "public interest" in considering an individual license application. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 215. That limitation was aptly explained by the Federal Radio Commission when discussing the Davis amendment of March 28, 1928 [45 Stat. 373 § 5], the statute from which Section 307(a) and (b) was derived in enactment of the Communications Act. Of the Davis amendment, the Federal Radio Commission said:

> " . . . it is true that the commission may on occasions be forced to deny an application the granting of which might, in its opinion, serve public interest, convenience, or necessity. The Davis amendment may, therefore, be viewed as a partial limitation upon the power of the commission in applying the standard." FEDERAL RADIO COMM'N ANN. REP. 166 (1928).

**Under Section 309(b), the right to a hearing depends on whether the issue of the public interest affecting an individual application is open for determination by the Commission, and not, as petitioners perhaps imply (Pet. Br. p. 16, fn. 9), on whether the

Clearly, the Commission is not required to grant a hearing to a license applicant who admittedly intends to carry on activities that statutes declare are contrary to the public interest.

When, however, the question of who should receive a license for a lawful use of an available facility is reached, the Congress has not conferred upon the Commission any authority to establish rigid classifications of applicants for licenses to the end that applicants may be deprived of their right of hearing. Only a case-by-case analysis and comparison of all relevant factors as to each applicant's ability to serve the public interest can meet the requirements of the Communications Act. *National Broadcasting Co.* v. *United States,* 319 U.S. 190; *Stahlman* v. *FCC,* 126 F.2d 124 (D.C. Cir.).

Petitioners' apparent reliance on *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (Pet. Br. pp. 10, 11, 19-23), as support for its position in the instant case is wholly misplaced. Although the chain broadcasting regulations, sustained in the *NBC* case, included a regulation (phrased in language no less mandatory than that in the rule here attacked) prohibiting a network from owning or controlling more than one station in a given service area, this Court was careful to note that

---

Commission is invoking a technical rule or a non-technical rule. Thus, in *New York Municipal Broadcasting System* v. *FCC,* 223 F.2d 637 (D.C. Cir.), a licensee authorized to operate broadcast transmitters at powers of 1 and 5 kilowatts applied for authority to install a single transmitter having a rated power of both 1 and 5 kilowatts. The Commission denied the application without a hearing, relying upon a technical rule (§ 3.41) fixing the maximum rated power of any broadcast transmitter in relation to its authorized power. The court held that the applicant was entitled to a hearing because the rule in question was not of the character encompassed in the exceptions to the generality of Section 309(b) which it had delineated in *Storer*—in other words, because the Congress has not itself defined the public interest in respect of a single transmitter having multiple power ratings.

> ". . . . The Commission . . . did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.'" (319 U.S. at 225)

That statement of the Court in the *NBC* case must be read in the light of commission recognition in the chain broadcasting regulations of a duty to preserve to a license applicant the statutory right to a hearing. Thus, in issuing those regulations, the Commission explicitly stated that a determination of the requirements of the public interest would, in spite of the regulations, still have to be made in passing upon particular applications. It stated:

> "Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an important aid to consistency and predictability and does not prejudice any rights of the applicant." FCC, REPORT ON CHAIN BROADCASTING (Docket No. 5060) 85 (1941).

Indeed, the Commission unsuccessfully resisted judicial review of those regulations, contending that, since they were characterized as announcements of policy, the order promulgating them was no more subject to review than a press release similarly announcing its policy. *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 422.

In his dissenting opinion in that case, Mr. Justice Frankfurter noted, in support of the Commission's contention, that:

> "... Congress established an administrative procedure under which the Commission must make a specific determination in each case whether the public interest would be served by granting the particular application before it. No announcement of general licensing policy can relieve the Commission of its statutory obligation to examine each application for a license and determine whether a grant or denial is required by the public interest." (316 U.S. at 432)

And in the *NBC* case itself, the petitioners stated, in their brief to this Court (at page 77):

> "Nor is there any basis for the suggestion (NBC Br. 87; CBS Br. 49) that the regulations are 'iron bound' and constitute an abdication by the Commission of all discretion. The Commission must apply the statutory standard of public interest, convenience or necessity to each application for a license in the light of the facts pertinent to the application. Each applicant (unless his application is granted without a hearing) is entitled to a hearing not only that he may have an opportunity to show that he is entitled to a grant of an application under the established policies of the Commission, but also that he may show, if necessary, that such policies are not appropriate in his particular situation."

The meaning of the decision in the *NBC* case is, as petitioners had urged it should be, that the Communications Act entitles each applicant for a license to a hearing in order that he may show that established commission

"policies are not appropriate in his particular situation". See *Thomas S. Lee Enterprises, Inc.*, 5 PIKE & FISCHER RADIO REG. 1179. That being so, petitioners' present contention (Pet. Br. pp. 10-11, 26-27) that an application may be dismissed without a hearing if it clashes with "policy judgments which the rule embody" is wholly inconsistent with their position in the *NBC* case and with this Court's decision in that case.

Petitioners have referred (Pet. Br. p. 23) to the waiver provisions of the Commission's Rules (§§ 1.701 and 1.702, 47 C. F. R. §§ 1.701, 1.702) as a method by which "in the instant case, the Commission may amend the multiple ownership rules as the public interest requires". Those waiver provisions are beside the point in this case since, as the Commission itself has stated, under Section 4(d) of the Administrative Procedure Act [5 U.S.C. § 1003(d)] it is not required when considering applications made pursuant to those provisions "to hold a hearing, or to engage in any other public rule-making proceedings." *Potomac Broadcasting Corp.*, 6 PIKE & FISCHER RADIO REG. 559, 564.

The question here is whether despite Section 309(b), the Commission may, as it did with Storer, deny an application for a license without granting a hearing and an opportunity to show that the substantive policies of the Commission are not appropriate in the applicant's particular situation. The statutory requirement of a hearing prior to adverse action by the Commission is not satisfied by anything less than a hearing. *FCC* v. *National Broadcasting Co. (KOA)*, 319 U.S. 239 (holding that the statutory requirement of a hearing prior to modification of a license under Section 312(b) of the Act was not satisfied merely

by providing an opportunity to file briefs and present oral argument).

The Congress, only recently, has indicated its understanding that the Commission may not, under present law, promulgate rules that create rigid classifications of applicants. The House version of S. 658, 82d Cong., 2d Sess., proposed an amendment of Section 308 of the Communications Act, as follows:

> "(d) The Commission shall not make or promulgate any rule or regulation, of substance or procedure, the purpose or result of which is to effect a discrimination between persons based upon interest in, association with, or ownership of any medium primarily engaged in the gathering and dissemination of information and no application for a construction permit or station license, or for the renewal, modification, or transfer of such permit or license, shall be denied by the Commission solely because of any such interest, association, or ownership."

A Conference Committee considered both the Senate and House bills. The bill, as reported out by the conference, was thereafter approved by both Houses and signed by the President. Although the bill did not contain the amendment, the Conference Report makes abundantly clear the reason for its omission:

> ". . . . This provision was omitted from the conference substitute because the committee of conference felt that it was unnecessary. It is the view of the conference committee that under the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or association with,

> a newspaper or other medium for gathering and disseminating information. Also the Commission could not arbitrarily deny any application solely because of any such interest or association." H. R. REP. No. 2426, 82d Cong. 2d Sess. 18-19.

POINT II

THE NUMERICAL PROSCRIPTION RULES ARE INVALID BECAUSE NOT IN ACCORDANCE WITH LAW, AND BECAUSE THEY ARE ARBITRARY AND CAPRICIOUS.

The Order states that the purpose of the numerical proscription rules is "to implement and enforce the [Communications] Act" (R. 18) and refers exclusively to Sections 311, 313 and 314 of the Act for the substantive provisions that purportedly authorize adoption of such rules (R. 27). Those three sections relate solely to the applicability of the antitrust laws to broadcasting. The Order also states that the rules were promulgated

> ". . . to implement the Congressional policy against monopoly enunciated specifically in Sections 311 and 313 of the Communications Act." (R. 19)

There can be no doubt, therefore, that at the time of the adoption of the rules the Commission intended them as an implementation of the antitrust laws and that their purpose was to safeguard the public against "monopoly".*

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*The Commission has heretofore consistently related its multiple ownership rules solely to problems of monopoly and competition. When it adopted its first numerical limitation on TV station ownership in 1940, it stated:

> "Monopoly must be avoided. Free competition is to be promoted and preserved." FCC, REPORT AND ORDER (Docket No. 5806) 28-29, May 28, 1940.

Similarly, the Commission described its original FM multiple ownership rules as intended "to safeguard the public against monopoly." FCC, Mimeo. 41739, June 22, 1940.

Apparently recognizing that the rules cannot be sustained on that basis, petitioners now argue that the action of the Commission may nevertheless be upheld as an implementation of a commission policy—stated in their brief (Pet. Br. p. 30) to be a policy different from the congressional policy against monopoly*—to diversify ownership in order to "maximize diversification of program and service viewpoints."

An administrative order will not be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained. *SEC* v. *Chenery Corp.*, 318 U.S. 80. Although the Commission may not justify its action on a ground different from that upon which such action was taken, the rules cannot be sustained upon either of the grounds alleged by petitioners.

A. The Numerical Proscription Rules Cannot be Sustained as an Implementation of Congressional Antimonopoly Policy.

The Congress has never enacted any antimonopoly legislation applicable to broadcasting which differs in any respect from the law applicable to other business. Section 313 of the Communications Act (which the Commission has said the rules are meant to implement) merely declares applicable to radio communications all

*In the Order, however, the Commission considered its "diversification principle" to be but an implementation of the antitrust laws. It stated that it had

> ". . . adhered to the principle of 'diversification' in order to implement the Congressional policy against monopoly and in order to preserve competition." (R. 21)

> "... laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade. ..."*

It may be conceded that the Commission has power to apply Section 313 by refusing licenses where the grant would result in a violation of any of the laws embraced by that section and, indeed, to take into account, in determining whether public interest requires the granting or withholding of a license in any given situation, competitive practices falling short of positive violation of the antitrust laws. *Mansfield Journal Co.* v. *FCC*, 180 F.2d 28 (D.C. Cir.). But, as this Court held in *FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 290, the Commission's power to adopt general rules purporting to apply specific federal laws is limited by the scope of those laws.

Viewed as a purported implementation of the antitrust laws, the numerical proscription rules constitute a determination by the Commission that the acquisition by any one person of an interest in more than the specified number of broadcast stations has an economic effect contrary to the policy of the antitrust laws, without regard to the facts concerning the actual or potential effect of such acquisition upon competition. That determination is squarely in conflict with the express provisions of the antitrust laws requiring analysis of economic consequences. The Commis-

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*The other antimonopoly sections of the Communications Act referred to in the Order are:

Section 311 (*supra*, pp. 3-4) which requires the Commission to refuse a license or permit to any person "whose license has been revoked by a court under Section 313", and

Section 314 which forbids common ownership, control or operation of radio and cable in international communication where the purpose or effect may be substantially to lessen competition, restrain commerce or unlawfully to create a monopoly.

sion must, of course, consider the special nature of the industry in determining what activities or acquisitions may substantially lessen competition [*FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 98], but it cannot rewrite the antitrust laws and hold that an acquisition having no effect or an insubstantial effect upon competition may substantially lessen competition.

The scope and extent of the policy underlying the antitrust laws is a legal question peculiarly within the province of the courts [*FCC* v. *RCA Communications, Inc.*, 346 U.S. 86], which have consistently held that questions of actual or potential antitrust law violation must be decided on the basis of all relevant facts with respect to competition. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528-29, 531.

Basic to a determination of the effect on competition of any proposed acquisition are such factors as the purpose of such acquisition, the existence, number, activity and strength of competitors in the market affected by the acquisition, the size and location of the acquiring interest and the size and location of the interest proposed to be acquired. *United States* v. *Columbia Steel Co., supra*, at 527-28; *Transamerica Corp.* v. *Board of Governors of Federal Reserve System*, 206 F.2d 163, 169-70 (3d Cir.). The numerical proscription rules preclude consideration of any of those factors.

But such factors, important from the antitrust standpoint in all fields of activity, require special consideration in the field of radio and television broadcasting. Radio and television stations differ substantially in important respects such as their geographical location, power, frequency, population served, hours of operation, pattern of coverage,

protection from interference by other stations and other like factors. *Radio Voice of Springfield, Inc.*, 3 PIKE & FISCHER RADIO REG., 2010, 2014. In each of its rules, the Commission explicitly recognizes that those factors must be considered whenever an applicant owns interests in less than the maximum number of stations allowed in the relevant class of service (R. 27-29). Its only excuse for refusing to consider them after an applicant reaches the specified number is that such a course would be "unsatisfactory or unworkable" (R. 22).

To preclude by an absolute numerical limit consideration of all those variable factors departs from long-established antitrust principles and creates an arbitrary and obviously false presumption that a TV station in Butte, Montana, is to be equated with a TV station in New York City.

Apart from such considerations, inquiry into the facts would be necessary even on the Commission's theory that for purposes of the antitrust laws all stations should be regarded as equal and competitive. The Commission's present allocation plan contemplates 1,850 commercial TV stations.* A single TV station thus represents only .00054 of the number provided by existing allocations. By § 3.636, the Commission would foreclose consideration of whether the increase in ownership from .00270 to .00324 of TV stations would, under the facts of a particular case, result in conflict with the policy of the antitrust laws. That determination obviously cannot be made *in vacuo*; it clearly requires thorough study, which § 3.636 precludes, of the facts existing at the time.

**Hearing Before the Subcommittee on Communications of the Senate Committee on Interstate and Foreign Commerce*, 83d Cong., 2d Sess. 142.

The numerical proscription provisions of § 3.636 are, therefore, not only arbitrary; they are in basic and fundamental conflict with the requirement and policy of the antitrust laws that the issue of undue concentration of economic power must be determined in the light of all relevant facts.* As this Court has stated in holding invalid a comparable rule:

> "... The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof, and precludes dispute. This is beyond administrative power." *Miller* v. *United States*, 294 U.S. 435, 440.**

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*Commissioner Doerfer has stated in connection with the action of the Commission in permitting two additional UHF TV stations to be owned by multiple owners of five VHF TV stations:

> "... I am constrained to record my misgivings about linking a numerical evaluation of stations with 'undue concentration of ownership' as an unfailing guide as to what is in the public interest.
>
> "... I have grave doubts as to the wisdom of picking a 'number' without more reliable and persuasive evidence that the number chosen will in all cases mark the upper limits of what will safeguard the public interest. ... There is not much more than intuition as the basis for the present rule." FCC, *Amendment of Section 3.636*, REPORT AND ORDER, 11 PIKE & FISCHER RADIO REG. 1519, 1526.

**Petitioners, seeking to justify the numerical limitation rules of the Commission as an implementation of antimonopoly policy (Pet. Br. p. 35, fn. 24), have referred to four situations in which legislative bodies, although not dealing with monopoly problems, have authorized establishment of standards in numerical terms. In two of the cases cited, *Darby* and *Decie*, which deal, respectively, with minimum wages and liquor licensing, the numerical limitations were fixed by statute, the administrative agency being without discretion to alter those fixed limits. In the *Morris* and *Cox* cases, the legislatures had again fixed numerical limits, but by express delegation had authorized the ad-

B. The Numerical Proscription Rules Cannot be Sustained as an Implementation of the Commission's Program Diversification Policy.

As we have pointed out (*supra*, pp. 22-26), because the rules cannot be sustained on the ground upon which the Commission acted—implementation of antimonopoly policy—they may not now be justified upon another ground. However, even if viewed, as is now suggested by petitioners (Pet. Br. pp. 30-36), as a purported implementation of a commission policy favoring diversification of program and service viewpoints, the rules are equally arbitrary and invalid.

Diversification of program and service viewpoints is one of a number of entirely proper objectives of the Commission. But the rule here under attack bears no relation to diversification of program and service viewpoints. The rule precludes all comparative consideration of the program and service viewpoints available in any service area; it applies to ownership of stations serving wholly different areas. By way of illustration, the maximum area served by a television station is measured by a radius of approximately 60 miles.* The fact that an applicant for a license

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ministrative agencies to adjust the prescribed figure only within narrow ranges.

But respondent does not contend that legislative bodies lack power either to set reasonable numerical limits in implementation of constitutionally proper policies or even to delegate that power by statute. It does contend, however, that there is nothing in the antitrust laws or the Communications Act to suggest that the Congress intended such technique to be applied by the Commission to the control of monopoly. Indeed, the Federal Trade Commission, an agency considerably concerned with the antitrust laws, has suggested that such a tactic by an administrative body defeats the very purpose of the Congress in creating such a body of experts. *Pillsbury Mills, Inc.*, FTC Docket No. 6000 (Dec. 21, 1953).

*FCC, *Television Allocations*, SIXTH REPORT AND ORDER, 1 PIKE & FISCHER RADIO REG., pt. 3, 91:599, 645-57.

for a television station in Miami, Florida, also has an interest in a television station in Detroit, Michigan, cannot have any conceivable relation to the question of program and service diversification in Miami, Florida.*

Furthermore, the rule here set aside excludes an otherwise qualified applicant for a given broadcast facility in an area which is not served by any such existing facility, even where there is no other qualified applicant. Similarly, the rule excludes a multiple owner from areas in which there are more facilities than qualified applicants and into which such owner would bring an additional viewpoint. Those results clearly are not in the public interest and exalt a formula at the expense of the public convenience.

Diversification is but one of the many factors to be considered by the Commission in determining the public interest. It includes not only radio and television, but newspapers, magazines, theatres and similar interests, and it must, as the Commission has frequently held, yield to proof of superiority in other respects. *Aladdin Radio and Television Inc.*, 9 PIKE & FISCHER RADIO REG. 1, 40. To exclude evidence with respect to all those other relevant factors simply because an applicant for a facility in one area has elsewhere acquired the maximum number permitted by the regulations is to sacrifice the public interest upon the altar of administrative convenience and expedience. It is to disregard the warning of this Court that an administrative

*If we correctly understand petitioners' opposition to this contention (Pet. Br. p. 32), it is that even if the station operations of a multiple owner, when viewed in their local service areas, increase the variety of viewpoints available to those areas, the total effect of such operations will be to create uniformity of opinion on the national level. That proposition, phrased somewhat in the terms of Gresham's law, would be that "good competition locally drives monopoly into being nationally."

agency must not place "excessive emphasis" upon a single facet of its responsibility. *Southern S. S. Co.* v. *NLRB*, 316 U.S. 31, 47.

The petitioners suggest (Pet. Br. p. 33) that the rules here under attack are merely an extension of an established diversification policy favoring applicants without newspaper connections in selecting among competing applicants for a license. That policy, however, unlike the numerical proscription rules, has never been treated by the Commission as an absolute prohibition [see *Bamberger Broadcasting Service, Inc.*, 11 F.C.C. 211; *Midland Broadcasting Co.*, 3 PIKE & FISCHER RADIO REG. 1961]; and, furthermore, it is related to diversification within the area served by the station to be licensed [*Scripps-Howard Radio, Inc.* v. *FCC*, 189 F.2d 677 (D.C. Cir.), *cert. denied* 342 U.S. 830].*

*Petitioners' reference to administration by the Commission of its diversification policy favoring applicants without newspaper connections sharply etches the error in their presumption (Pet. Br. p. 39) that because "the Commission may impose *some* limitation upon multiple ownership of broadcasting stations, . . . the selection of a particular ceiling is a matter for the Commission's informed and expert judgment." As we have shown, (*supra*, pp. 20-21), it is the understanding of Congress that the Commission is not authorized to make or promulgate any rule creating rigid classifications of applicants. The Commission in the past has acknowledged this limitation on its authority. (See, S. REP. No. 741, 81st Cong., 1st Sess. 2-3; Opinion of FCC General Counsel Hampson Gary, February 13, 1937). The court below reached the same conclusion in *Stahlman* v. *FCC*, 126 F.2d 124 (D.C. Cir). In that case, while upholding a Commission subpoena issued in an investigation of newspaper-radio ownership, the court stated:

> "If in this case it had been made to appear, as counsel for appellant insist, that the Commission's investigation was solely for the purpose of the consideration or adoption of a hard and fast rule or policy, as the result of which newspaper owners may be placed in a proscribed class and thus made ineligible to apply for or receive broadcast licenses, we should be obliged to declare that such an investigation would be wholly outside of and beyond any of the powers with which Congress has clothed the Commission." 126 F.2d at 127.

We have thus far treated the numerical proscription rules as if they impose limits merely on the number of stations that might be owned or controlled by any one person. The fact is, however, that the numerical limits which they impose relate not merely to ownership or control but to any interest whatever, as stockholder, officer or director, subject only to the qualification that stock interests of less than 1% may be disregarded in the case of corporations having more than 50 voting stockholders. The rules thus operate to exclude an applicant for a television license if a 1% stockholder of the applicant happens to own 1% of the stock of any other company or companies interested in the aggregate in five television stations, without regard to the facts concerning control of the operation or policies of any of the stations involved. See *Westinghouse Broadcasting Co.*, 10 PIKE & FISCHER RADIO REG. 161 and 202. It would be difficult to conceive of a more extreme case of administrative capriciousness.

Accordingly, even if the Commission had predicated its action in adopting the rules upon a policy of program diversification different from congressional antimonopoly policy, such rules would nevertheless be arbitrary and capricious and therefore invalid.

C. The Numerical Proscription Rules Debase Performance of the Commission's Administrative Function.

The gist of petitioners' position in this case is that the Commission "is not required by Section 309(b) to reopen, on a case-to-case basis, the policy judgments which the rules embody." (Pet. Br. pp. 20-27).

Section 309(b), as already noted, in terms of broadest generality, confers the right to a hearing upon an applicant

to whom the Commission would deny a license. When commenting upon the duties of other administrative agencies under statutes in which Congress advisedly has left implementation of flexible concepts to the discretion of the agencies, this Court has said that such concepts are "to be defined with particularity by the myriad of cases from the field" over which the agency has cognizance. *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394. Under the licensing provisions of the Communications Act, the expertise of the Commission was intended to play continually upon the delicate function of licensing a scarce communication medium. *National Broadcasting Co.* v. *United States*, 319 U.S. 190.

While the Commission is authorized to proceed by general rule in appropriate cases, it is nevertheless true, as this Court pointed out in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203, that

> ". . . the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective."

In the present case, petitioners have urged the specialized and varying nature of the problem as a reason for a general rule, rather than case-to-case adjudication. Thus they have stated that a general rule incorporating numerical proscription of multiple ownership is necessary because of the uncertainties of case-by-case adjudication "in a realm where particular evils are not readily susceptible of proof on an individual case basis" (Pet. for Cert., p. 12). If each administrative agency to which Congress has given power

to resolve "uncertainties . . . not readily susceptible of proof" attempts to settle those uncertainties simply by announcing general rules, the rationale for creation of the agency disappears. If blocks of license applications, by unreflective decisions dictated by general rules, are to be presumed unlawful, the purpose of having a Commission is lost. If the Commission thus destroys the rationale for its creation, it may as well give way to the Congress.

POINT III

THE NUMERICAL PROSCRIPTION RULES ARE INVALID BECAUSE THEIR BASIS IS NOT ADEQUATELY DISCLOSED.

The scope of judicial review of orders of the Commission has been narrowed both by acts of Congress and by acts of judicial self-restraint out of deference for the special knowledge and expertise of the agency. *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266. But the Congress has never intended and the courts have never permitted such deference to serve as a sanction for inadequately explained agency conduct.

Section 4(b) of the Administrative Procedure Act requires that the Commission "shall incorporate in any rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 1003(b). On review, that statement becomes the touchstone against which the validity of the rules must be tested.

Recently, in *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, this Court ordered remand of a case because the Commission had not "sufficiently laid bare its mind to enable us [the Court] to perform our reviewing function." *Ibid.* at 95. Although the Commission had in its decision

contended that beneficial effects would flow from its action, it had done so "in an abstract, sterile way." *Ibid.* at 94; see also *Easton Publishing Co.* v. *FCC*, 175 F.2d 344 (D.C. Cir.); *Johnston Broadcasting Co.* v. *FCC*, 175 F.2d 351 (D.C. Cir.).

The reason set forth by the Commission in the Order to support its choice of the specific numerical limitations of the revised rules are not related to the congressional policy against monopoly or even to the Commission's diversification principle. No attempt was made to show that the specific numbers chosen bear any rational relationship to "concentration of control" of broadcasting "contrary to the public interest, convenience or necessity." No showing whatsoever was made of the manner in which those specific numbers would operate to serve the public interest.

The precise words used in the Order are as follows:

> *AM*—the number seven was selected ". . . . in order that present holdings of such stations be not unduly disrupted." (R. 26)
>
> *FM*—the number seven was selected because ". . . It is considered desirable to have the same limitation applicable to both aural services because of their inter-relationship and the present status of FM's growth." (R. 26)
>
> *TV*—The number five was continued in effect because, ". . . The attached rules continue in effect the existing limitation on TV station ownership which, in our judgment based on extensive experience with the problems of multiple ownership, have proven practicable and desirable." (R. 25)

The failure of the Commission to relate its choice of numbers to the avowed purpose of the rules results from the fact that the Commission has not made any study and

does not have any experience upon which to accomplish what courts and other administrative agencies have found impossible: the development of an inflexible numerical formula defining what in all cases will constitute undue concentration of control.*

In support of reference to the Commission's "extensive experience with the problem of multiple ownership," petitioners were able in the court below to point to only two instances of persons having interests in more than seven AM stations and to no instance whatever of ownership of an interest in more than seven FM stations or five TV stations. The FM and TV numerical limitation rules have

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*See footnote (*) at page 26, *supra*.

Petitioners imply (Pet. Br. pp. 6-7, fn. 4; p. 31, fn. 19) that in 1949, in the rule making proceeding which followed release by the Commission of its Notice of Proposed Rule Making (R. 13-14), Storer took a position contrary to that for which it now contends. The record contradicts that contention. Many interested parties filed statements in opposition to the proposed rules (R. 1-8, 16-17) and thereafter argued in opposition to the rules (R. 10-11, 12-13), taking precisely the position that Storer urges in this proceeding, *i.e.*, that the Commission is without power to make and promulgate numerical limitations upon the number of broadcast stations which can be owned and operated by any person. The spokesman for Storer joined in their objection to the proposed rules (R. 11), but urged that if the Commission should decide to set some numerical limit upon ownership, it should adopt the same limitation number for both AM, FM and TV facilities (R. 8-9, 12).

The Commission did not promulgate the multiple ownership rules here under attack until more than five years after it had proposed them and had received statements in opposition, during which time the TV industry had burgeoned from almost nothing to one that was displacing AM as the principal commercial broadcasting medium. Any suggestion in the instant proceeding that Storer should be foreclosed by the 1948-1949 rule making hearings is a distortion of the rule making function. Administrative Procedure Act, *Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 257-260; Monograph of the Attorney General's Committee on Administrative Procedure, *Federal Communications Commission*, S. Doc. No. 186, pt. 3, 76th Cong., 3d Sess. 73-80.

been in effect since the early 1940's and have precluded consideration of the question by the Commission in those services. In only one case has the Commission been faced with the question in the AM service, and in that instance its "experience" was limited to denial of the acquisition of an eighth station. *Sherwood B. Brunton,* 11 F.C.C. 407.

Although not explicitly stated, petitioners suggest (Pet. Br. pp. 12-14) that the numerical proscription rules have been a factor in promoting the growth of radio and television. But there was no numerical proscription rule applicable to AM radio stations prior to the rules here under attack. In so far as concerns FM and TV, what little evidence there is available supports the conclusion that the limitations may have stunted rather than fostered growth. There are only approximately one-fifth as many FM stations in the country as are permitted under the Commission's allocations. Since 1952, applications have been filed for only about 710 commercial television stations out of the 1,850 allocated. Moreover, there are today only about 440 such stations in operation. Since 1952, a substantial number of television construction permits and licenses have been surrendered. Most of those surrenders came because single station owners have found it economically infeasible to proceed with their plans. The Commission has been forced to acknowledge that its rule limiting ownership to five TV stations was a factor in preventing full development of UHF. It said in support of its rule change permitting multiple owners to acquire two UHF stations in addition to the five permitted VHF stations:

> ". . . the prestige, capital, and know-how of the networks and other multiple owners would be most effective in aiding UHF. We are persuaded that

> the entry of these multiple owners into such key markets will furnish a substantial impetus to UHF." FCC, *Amendment of Section 3.636*, REPORT AND ORDER, 11 PIKE & FISCHER RADIO REG. 1519, 1523.

In the instant proceeding, the Commission failed completely (1) to make any basic or ultimate factual findings or determinations, (2) to make any attempt at rational conclusions based upon any factual considerations or (3) to state clearly the basis or reasons for the establishment of the numerical limits. See *Tri-State Broadcasting Co.* v. *FCC*, 96 F.2d 564 (D.C. Cir.). In so far as the Order purports to explain the numerical limits set by the rules, the Commission has not laid bare its reasons with sufficient clarity to permit the Court to perform its reviewing function. *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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